MOTION FILED
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CASE NO. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

TED ENGLE, Petitioner

v.

LINCOLN ISAAC, Respondent

E.P. PERINI, Petitioner

v.

KENNETH L. BELL, Respondent

TED ENGLE, Petitioner

v.

HOWARD HUGHES, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SUPPORTING RESPONDENTS

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MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The undersigned hereby requests leave to appear as amicus curiae supporting Respondents on behalf of Institutional Legal Services Project of Seattle, Washington. Institutional Legal Services Project is publicly funded and represents, on civil and post-conviction matters, persons in state custody in the State of Washington. The Ninth Circuit Court of Appeals has recently ruled on habeas corpus issues related to this case in the case of a Washington prisoner; the continued vitality of that ruling may be affected by the outcome of this case. Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). Institutional Legal Services represents another Washington prisoner whose case, raising issues closely related to those in Myers, was argued in the Ninth Circuit on July 8, 1981; at that argument, the question of the pos-

sible impact of this Court's decision in the present cases was raised. Gibson v. Spalding, Ninth Circuit No. 80-3522. Other clients of this office will likely be affected by the outcome of the present cases in this Court.

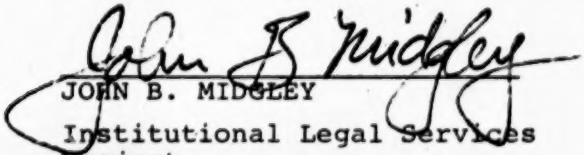
The brief included with this motion addresses issues which, to this writer's knowledge, are not being directly addressed by the parties. Specifically, the question is raised whether the holding of Wainwright v. Sykes, 433 U.S. 72 (1977) applies to the types of federal constitutional issues raised in the cases at bar. Argument is presented that, with respect to the federal habeas corpus petitions involved in these cases, which request relief under new constitutional decisions applied with full retroactive effect to the habeas petitioners' trials, Wainwright does not provide the standard

for determining whether the claims should be heard on the merits in federal habeas proceedings. It is respectfully submitted that this amicus curiae brief presents arguments which this Court should consider in deciding these cases.

The undersigned has, as required by Supreme Court Rule 36.2, sought consent for appearance as amicus curiae from all parties. Written consent was received from counsel for Respondents Bell and Hughes. See Appendix to Brief of Amicus Curiae. The undersigned wrote to Mr. Kingsley, counsel for Respondent Isaac, requesting consent. Mr. Kingsley has not responded, and the undersigned has been unable to reach him by telephone. Counsel of record for petitioners refused consent on the basis set forth in his letter of July 27, 1981. See Appendix to Brief of Amicus Curiae. It is submitted that there

has been no substantial reason advanced by any party why the present motion should not be granted.

Respectfully submitted this
5th day of August, 1981



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BRIEF OF AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICUS CURIAE

Institutional Legal Services Project is publicly funded and represents, on civil and post-conviction matters, persons in state custody in the State of Washington. The Ninth Circuit Court of Appeals has recently ruled on habeas corpus issues related to this case in the case of a Washington prisoner; the continued vitality of that ruling may be affected by the outcome of this case. Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). Institutional Legal Services represents another Washington prisoner whose case, raising issues closely related to those in Myers, was argued in the Ninth Circuit on July 8, 1981; at that argument, the question of the possible impact of this Court's decision in the present cases was raised. Gibson v. Spalding, Ninth Circuit No. 80-3522.

Other clients of this office will likely be affected by the outcome of the present cases in this Court.

SUMMARY OF ARGUMENT

Wainwright v. Sykes, 433 U.S. 72 (1977) does not govern the question whether the habeas corpus petitions in the present cases should have been heard on the merits. Since, as is assumed herein, the present cases involve the application of new constitutional rules to trials which were held before the new rules were promulgated, and since such rules are fully retroactive to those trials, Wainwright does not apply. Therefore, the petitions in these cases were correctly heard on the merits by the Sixth Circuit.

The constitutional analysis used by this Court to determine the retroactivity of new decisions takes into account the states' interests in the integrity of

their criminal justice systems. Relatively few basic new constitutional decisions are held to be fully retroactive. When full retroactivity is extended, convicted persons may raise claims under the new rule in habeas corpus proceedings.

Wainwright v. Sykes, supra, does not apply to determinations of the availability of habeas corpus relief in these circumstances for several reasons. Wainwright dealt with the failure to raise before trial a well-established constitutional claim, not a constitutional claim yet to be established. The interests of the states in their contemporaneous objection rules, a major basis for the holding of Wainwright, are not implicated where changes in law could not have been anticipated before trial. The state interests which are relevant to changes in constitutional law are taken into account in the

retroactivity determination itself. Similarly, considerations concerning defense counsel's conduct of a trial and whether counsel's tactical choices can bind the defendant, as implicated by Wainwright, have no application where constitutional changes could not be anticipated and such choices were not being made.

Lower federal courts have struggled with the question of application of Wainwright to retroactivity cases largely because of this Court's dictum in Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977). However, the application of Wainwright through this dictum would undermine the holding of Hankerson that new constitutional rules intended to protect the integrity of the fact-finding function of trials must be held fully retroactive. Thus, application of Wainwright in this

situation would not only be illogical, such application would threaten to undermine this Court's decisions that certain vital constitutional rules are to be applied fully retroactively.

The doctrine of Fay v. Noia, 372 U.S. 391 (1963) continues to provide the correct standard for determining whether habeas petitioners raising the application of fully retroactive constitutional decisions to their earlier trials must be heard on the merits. The Fay rule, in conjunction with the doctrine of harmless constitutional error, will provide adequate protection for state interests with respect to fully retroactive constitutional decisions.

ARGUMENT

THE JUDGMENT OF THE SIXTH CIRCUIT TO HEAR THESE HABEAS CORPUS CLAIMS ON THE MERITS WAS CORRECT ON THE ALTERNATE GROUND THAT WAINWRIGHT V. SYKES DOES NOT GOVERN THE CLAIMS RAISED.

The Sixth Circuit decided the cases at bar under the assumption that the question whether petitioners'[1] habeas corpus petitions may be heard by a federal court is governed by Wainwright v. Sykes, 433 U.S. 72 (1977). See, e.g., Isaac v. Engle, 646 F.2d 1129, 1133 (6th Cir. 1980)(en banc); Bell v. Perini, 635 F. 2d 575, 577-578 (6th Cir. 1980). However, as is shown herein, this assumption was unwarranted: Wainwright is inapplicable because petitioners raise claims under substantive constitutional

[1]Respondents in this Court are herein denominated "petitioners" because they filed habeas corpus petitions in the District Court. Petitioners in this Court, officials of the State of Ohio, are herein denominated "the State".

decisions which must be applied retroactively to petitioners' trials. The Sixth Circuit was thus correct, on the grounds presented here as well as those articulated in its opinions, in hearing petitioners' claims on the merits.

A. A Habeas Corpus Petitioner's Claim Of Unconstitutional Conviction Under A Fully Retroactive Substantive Constitutional Decision Rendered After Petitioner's Trial Is Not Subject To The Rule of Wainwright v. Sykes.

This Court has repeatedly held fully retroactive due process decisions which enforce the basic constitutional requirement that the prosecution bear the burden of proof of criminal conduct beyond a reasonable doubt. Ivan V. v. City of New York, 407 U.S. 203 (1972) (holding fully retroactive the rule of In re Winship, 397 U.S. 358 (1970); Hankerson v. North Carolina, 432 U.S. 233 (1977) (holding fully retroactive the rule of

Mullaney v. Wilbur, 421 U.S. 684 (1975)). In so doing, the Court has of course applied the accepted analysis for determining retrospective application, which has developed from decisions such as Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967). Briefly stated, the Court generally examines three factors to determine whether a rule should be retroactive: the purpose to be served by the new rule; the extent of reliance by law enforcement authorities on the old standards; and the effect retroactive application would have on the administration of justice. Stovall v. Denno, supra, 388 U.S. at 296-297. However, the purpose of the rule may be controlling, and when the major purpose of a new rule is to overcome an aspect of the criminal trial process which substantially impairs its truth-finding

function, the new rule is made fully retroactive whatever the extent of past reliance or burden on the administration of justice. Hankerson v. North Carolina, supra, 432 U.S. at 241-244. In addition, the retroactivity of some new constitutional decisions, generally those which would preclude a trial at all, is judged under a slightly different analysis. See Robinson v. Neil, 409 U.S. 505 (1973) (double jeopardy claim).

This Court has applied the above tests to hold fully retroactive relatively few new constitutional rules; the rules held fully retroactive have usually involved basic, non-procedural, rights or those rights directly related to the integrity of the fact-finding process. See, e.g., Berger v. California, 393 U.S. 314 (1969) (confrontation claim); Robinson v. Neil, supra, (double Jeopardy); Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (right to

counsel at trial); Hankerson v. North Carolina, supra (due process standard of guilt beyond a reasonable doubt). On the other hand, the Court has, at least where the purpose of a new rule does not require a contrary result, recognized the states' (and the federal government's) interests in reliance on established rules and burden on the administration of justice, and has declined to give full retroactive effect to many new constitutional decisions. See, e.g., Linkletter v. Walker, supra (Fourth Amendment exclusionary rule retroactive only to cases pending when new rule announced); Johnson v. New Jersey, 384 U.S. 719 (1966)(rights to counsel and to understanding of warnings during custodial interrogation applied only to trials begun after new decisions); De Stefano v. Woods, 392 U.S. 631 (1968) (right to jury trial held applicable only to trials beginning after

new decision); Stovall v. Denno, supra (counsel during identification procedures required only after date of new decision).

This Court thus takes into account, in the determination whether to apply new decisions retrospectively, the states' interests in the integrity of their criminal justice systems, and in the finality of criminal judgments rendered under the belief that established procedures and rules were constitutional. And when, after the appropriate interests have been considered, a new rule is nevertheless deemed so basic that it must be given full retroactive effect, relief has been granted even in the absence of objection during the prosecution which preceded the new decision. See, e.g., Robinson v. Neil, 409 U.S. 505 (1973) (both state and federal courts allowed double jeopardy retroactivity claim to be raised despite guilty plea, no objection in trial

court, and prior unsuccessful habeas corpus petition raising double jeopardy claim); McConnell v. Rhay, 393 U.S. 2 (1968) (state court and this Court heard claim of retroactivity of requirement of counsel at deferred sentencing apparently raised for first time on state habeas).

The allowance of habeas relief where new constitutional rules have been found so basic as to be fully retroactive is obviously based on the reasonable perception that defendants and their counsel cannot be held to anticipate changes in the law, and that lack of anticipation cannot be used to deny these vital rights. As this Court said with respect to a rule held partially retroactive: "Defendants can no more be charged with anticipating [the new] decision than can the states". O'Connor v. Ohio, 385 U.S. 92, 93 (1966) (applying to defendant who first

raised the issue on petition for certiorari in this Court the rule of Griffin v. California, 380 U.S. 609 (1965), which is retroactive to cases pending when it was announced).

Winship and Mullaney were held fully retroactive because the rules in those cases are so intimately connected with the accuracy of past verdicts: the rules were established "to prevent the erroneous conviction of innocent persons". Hankerson v. North Carolina, supra, 432 U.S. at 239; see also Id. at 240-244. The substantive rule under which petitioners in the instant cases seek relief is exactly the same type of rule. Isaac v. Engle, supra, 646 F.2d at 1134-1136 (en banc plurality opinion).[2]

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[2]The argument herein assumes that petitioners' trials suffered from Winship-Mullaney defects, as was found by the Sixth Circuit. Inso far as the correctness of the Circuit's conclusion in this

Because the accuracy of convictions obtained in violation of such rules is cast into doubt, the rule must be applied retroactively to petitioners' convictions, and petitioners may raise its application to them in federal habeas corpus proceedings.

Wainwright v. Sykes, 433 U.S. 72 (1977) does not, by itself, alter any of the above. Wainwright involved the question whether the failure to raise a well-established constitutional question[3] before trial as required by a state rule could prevent a hearing on the merits of the claim in a habeas proceeding in federal

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2(cont.)
regard is an issue in this Court (see Brief of Petitioners at 18-24), such issue is beyond the scope of this Brief.

[3]The issue raised was whether Sykes' confession should not have been admitted because he did not understand pre-confession warnings of his constitutional rights. 433 U.S. at 75.

court. This Court held that such a failure could prevent a hearing on the merits, absent a showing of cause for the failure to raise the issue and prejudice from the alleged constitutional violation. However, neither the holding nor the reasoning of Wainwright apply to constitutional claims not reasonably foreseeable by the time of trial. The state's interests in enforcement of its legitimate procedural rules, which form much of the basis for Wainwright (see 433 U.S. at 88-90), are simply not implicated where a defendant seeks relief under a new rule which neither prosecution nor defense anticipated would be promulgated and then applied retroactively. See Myers v. Washington, 646 F.2d 355, 359-360 (9th Cir. 1981). Moreover, as is shown above, the state's interests which are most relevant in this context,

those interests relating to finality and whether past convictions must nevertheless be re-examined in light of new constitutional rules, have already been taken into account in the retroactivity determination itself.

Another aspect of Wainwright further shows that it is not applicable to issues involving rules promulgated after trial and held retroactive. Wainwright places the focus of determinations of procedural default and forfeiture squarely on the conduct of defense counsel during trial[4], and suggests that counsel's conduct may

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[4] See, e.g., "The Supreme Court, 1976 Term", 91 HARVARD L. REV. 1, 217-221 (1977); Schwarzer, "Dealing With Incompetent Counsel - The Trial Judge's Role", 93 HARVARD L. REV. 633, 633-649 (1980); Cover and Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court" 86 YALE L.J. 1035, 1072-1086 (1977); Hill, "The Forfeiture Of Constitutional Rights In Criminal Cases", 78 COLUMBIA L. REV. 1050, 1067-1070 (1978).

sometimes be seen as binding on the defendant. See Wainwright, 433 U.S. at 92-94 (concurring opinion of Burger, C.J.) However, no matter what the ultimate scope of such reliance on counsel with respect to previously well-established constitutional claims, such a doctrine could not reasonably be extended to those claims which could not have been anticipated by defendants or their counsel. Even competent attorneys cannot be seen as binding their clients on issues such attorneys could not be required to recognize.[5] Again, Wainwright does not

[5]The very phraseology courts use to determine Wainwright issues, such as "defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right" (Wainwright, 433 U.S. at 90); and "tactical considerations" (Francis v. Henderson, 425 U.S. 536 at 540, quoting Davis v. United States, 411 U.S. 233 at 241 (1973), have no discernible meaning in this context. Such phrases do not describe the usual pre-retroactivity situation, in

apply.

Lower federal courts, have, despite the above, felt constrained to struggle with the application of Wainwright to claims such as those in the present case largely because of this Court's dictum in Hankerson v. North Carolina, supra, 432 U.S. at 244, n.8.[6] Compare the Sixth

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5(cont.)
which defendants and their counsel have no chargeable knowledge that rights are being violated, and are not making choices whether or not to raise an issue. Even the idea of a "failure to raise" an issue has little meaning here, since the phrase implies at least that a choice was apparent but not recognized, or that a possibility was recognized but not pursued. Before a new rule later held retroactive is even announced, few if any such actions or failures to act were occurring.

[6]"Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many

Circuit panel decision in one of the present cases, Isaac v. Engle, 646 F.2d 1122 (6th Cir.1980) (Wainwright does not apply) with the en banc decision, Isaac v. Engle, 646 F.2d 1129, 1133 (6th Cir. 1980) (opinion of Brown, J.) (Wainwright applies, Hankerson dictum adverted to). Compare also Myers v. Washington, supra, 646 F. 2d at 359-360 (Wainwright does not apply to issue which could not have been anticipated); with Cole v. Stevenson, 620 F. 2d 1055, 1059-1062 (4th Cir.1980) (en banc) cert. denied, _____ U.S. _____, 101 S. Ct. 545 (1980) (Hankerson dictum is

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6 (cont.)
defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g.,Fed. Rule Crim. Proc. 30 ".

controlling; cf. dissenting opinions).

It is respectfully submitted that the dictum in footnote 8 of Hankerson should be abandoned lest it swallow not only the holding of Hankerson, but this Court's entire line of decisions holding that certain constitutional requirements are so basic that they must be retroactively applied. This danger is highlighted by a leading commentator on questions of state procedural grounds sufficient to prevent federal review[7], who, in an article largely supportive of this Court's adoption in Wainwright of an "adequate state ground" analysis, is driven to write:

> A remaining problem involves the failure of counsel to anticipate, by appropriate submission in the original

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[7] See, in addition to the article quoted in the text: Hill, "The Inadequate State Ground", 65 COLUMBIA L. REV. 943 (1965).

proceeding, a subsequent change in constitutional law, proclaimed by the Supreme Court with retroactive effect. The decision of the Court to make its new rule retroactive would be reduced to a mockery if the right of the prisoner depended on the foresight of counsel in anticipating the new constitutional development. In 1966, the Court held explicitly "that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right". O'Connor v. Ohio 385 U.S. 92, 93 (1966). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 142-145 (1967) (Harlan J., plurality opinion); id. at 172 n. 1. (Brennan, J., concurring in part and dissenting in part). However, six days prior to the decision in Wainwright, the Court indicated that it was of a contrary mind, in a dictum that made no reference to earlier cases. Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977). It is submitted thac the rule of O'Connor is more likely to prevail to the extent that the Court intends full retroactivity for newly-proclaimed constitutional rights.

. . .

The problem of retroactivity is a difficult one, and should be

> dealt with forthrightly. The writer cannot believe that the solution proposed in the Hankerson dictum will long commend itself to the Court.

Hill, "The Forfeiture of Constitutional Rights In Criminal Cases", 78 COLUMBIA L. REV. 1050, 1078-1079, n. 160 (1978) (excerpts) (emphasis added).

Similarly, Judge Friendly, clearly an advocate of some of the restrictions on the writ which this Court has recently established,[8] would except from those restrictions petitions based on rules retrospectively applied precisely because this Court's "retroactivity" analysis provides sufficient safeguards to the interests of federalism:

> New constitutional developments relating to criminal procedure are another special

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[8] See, e.g., Friendly, "Federalism: A Foreword" 86 YALE L.J. 1019, 1031 (1977) ("applaud[s]" result in Stone v. Powell, 428 U.S. 465 (1976)).

> case. The American Bar Association Report [ABA Standards Relating To Post-Conviction Remedies, Approved Draft 1968] says that these produce a growing pressure for post-conviction remedies. But here the Supreme Court itself has given us the lead. In only a few instances has it determined that its decisions shall be fully retroactive ...In most cases the Court has ruled that its new constitutional decisions concerning criminal procedure need not be made available for collateral attack on earlier convictions... While neither a state nor the United States is bound to limit collateral attack on the basis of a new constitutional rule of criminal procedure to what the Supreme Court holds to be demanded, I see no occasion to be holier than the pope.
>
> None of these four important but limited lines of decision [retrospective application was one of four] supports the broad proposition that collateral attack should always be open for the asserted denial of a "constitutional" right, even though this was or could have been litigated in the criminal trial and on appeal.

Friendly, "Is Innocence Irrelevant?

Collateral Attack On Criminal Judgments",

38 CHICAGO L. REV. 142, 153-154 (1970) (footnotes omitted). See also Westen, "Away From Waiver: A Rationale For The Forfeiture Of Constitutional Rights In Criminal Procedure", 75 MICHIGAN L.REV. 1214, 1245 (1977)("intimate connection between retroactivity and forfeiture", defendant entitled to raise claim which has been held "constitutionally retroactive" despite lack of objection at earlier stage).

This Court in Hankerson v. North Carolina, supra, repeatedly stated that considerations of impact on administration of justice would not preclude the full retroactive effect of new constitutional rules intimately connected with the integrity of the fact-finding process. See 432 U.S. 241, 243. However, the Hankerson dictum discussed above threatens to resurrect impact on the administration of justice in a new and irrational form.

Application of Wainwright through the Hankerson dictum raises the danger that retroactivity questions may turn not on factors deemed relevant by this Court, but rather on the question, irrelevant in this context, whether petitioner can show why defense counsel did not object under a rule not yet formulated [9]. See Cole v. Stevenson, supra, 620 F.2d at 1068-1071 (dissenting opinion). Past verdicts rendered seriously questionable under Winship and Mullaney are not less questionable because there was no objection. The Hankerson dictum should not be used to undermine,by incorrectly bringing Wainwright considerations into play, the actual holding of Hankerson.

B. Fay v. Noia Provides The Proper Standard For Determining When A Federal

[9]"Cause" under Wainwright is clearly present in these cases, as the Sixth Circuit found. However, where, as here, Wainwright does not apply, petitioners should not bear the burden to show cause.

Court Should Decline To Hear A Habeas Corpus Claim Of Application Of A Fully Retroactive Constitutional Decision Rendered After The Petitioner's Trial.

This Court held in Fay v. Noia, 372 U.S. 391 (1963) that only if the state could show that a habeas petitioner had deliberately bypassed the raising of a constitutional claim at an earlier stage would federal courts decline to hear such claims. The deliberate bypass standard of Fay was abrogated as to at least some constitutional claims in Wainwright v. Sykes, supra, and was replaced with the cause-prejudice test. However, in Wainwright this Court left open the question of the continued viability of the Fay standard in other areas. Wainwright, supra,433 U.S. at 88, n.12. As is shown below, the Fay standard should be applied to cases raising retroactivity claims.

The Wainwright standard is not applicable to habeas petitions raising the

application of retroactive constitutional rules, for the reasons stated in § A., above. As has been shown, in the normal case of this type, there will be no decision of any sort whether to raise application of a rule yet to be born, and the retroactivity test itself adequately protects relevant state interests by allowing few rules to be held fully applicable to past convictions. However, it is conceivable that the constitutional significance of a practice later held to violate a new constitutional rule was actually appreciated by the defendant and defense counsel and a conscious tactical decision was made to forego raising the issue in some few cases. In such circumstances, the state has a legitimate interest in precluding further litigation of the claim. Thus the Fay standard should be applied, al-

lowing the state to show deliberate bypass in the exceptional case. Application of this standard will protect defendants who, along with their counsel, had no appreciation that their rights would be violated by certain jury instructions, yet will protect the criminal justice system against true abuse when deliberate bypass has occurred.

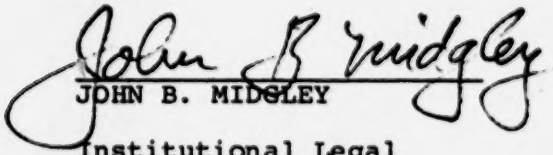
The "harmless constitutional error" doctrine of Chapman v. California, 386 U.S. 18 (1967) also will continue to protect states against reversal of convictions where unconstitutional instructions could not have affected the outcome. See Sandstrom v. Montana, 442 U.S. 510, (1979) (remanded for determination of harmless error by state courts). This doctrine, along with the rule of Fay, will amply protect those state interests which remain once a new constitutional decision

has been held fully retroactive.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals to hear petitioners' constitutional claims on the merits was correct and should be affirmed.

Respectfully submitted
this 5th day of August,
1981.



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July 23, 1981

John Midgley, Esquire
Evergreen Legal Services
Institutional Legal Services Project
1702 Smith Tower
Seattle, Washington 98104

Re: Perini v. Bell
Engle v. Hughes
No. 80-1430

Dear Mr. Midgley:

As counsel for Mr. Bell and Mr. Hughes in the above-referenced case, I hereby give written consent for the Evergreen Legal Services Project to appear and file a brief as amicus curiae. It is my understanding that this letter will comply fully with Rule 36.2 of the United States Supreme Court Rules.

If any further information is required by the Court, please let me know.

Very truly yours,

Richard L. Aynes

RLA:th

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State of Ohio
Office of the Attorney General

William J. Brown
Attorney General

Bruce J. Rakay
First Assistant Attorney General
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G. Duane Welsh
Deputy Attorney General

July 27, 1981

Mr. John Midgley
Senior Attorney
Evergreen Legal Services
1702 Smith Tower
Seattle, Washington 98104

Re: Engle v. Isaac

Dear Mr. Midgley:

This is to acknowledge receipt of your request for consent to amicus participation in the above styled case. In the best interests of my clients however, I will not accede to your request. The case is already being briefed by the U.S. Justice Dept. and the Ohio Public Defenders Association as amici for the respective parties. I do not believe an additional brief would further define the issues.

Respectfully yours,

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Assistant Attorney General
(614) 466-5414

SBK:lsa

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